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No. 114

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

THE STATE CORPORATION COMMISSION FOR THE STATE OF KANSAS, HOMER HOCH, JESSE W. GREENLEAF ET AL., APPELLANTS,

VS.

THE WICHITA GAS COMPANY, HUTCHINSON GAS COMPANY, NEWTON GAS COMPANY, AND CITIES SERVICE GAS COMPANY, ET AL., APPELLEES,

BRIEF FOR APPELLEE, CITIES SERVICE GAS COMPANY.

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BRIEF FOR APPELLEE, CITIES SERVICE GAS COMPANY.

STATEMENT.

Unfortunately for this appellee, no notice of appeal nor a copy of the record was served on it by the appellant. Nor did it have any notice of, or anything to do with, the preparation of the condensed statement of the evidence presented here. It is a fact that its first knowl-

edge of these things and the first knowledge of its attorneys of record came to attention less than thirty days ago. While it is not being urged that the appeal be dismissed for this violation of the rules, it is respectfully requested that the statement as to issues be not rigidly enforced against this appellee. While we have tried to keep within the record, and we believe we have done so, yet, if the court should find any transgression it is hoped it will be viewed in the light of this statement.

Appellee, Cities Service Gas Company, is now and during all the times involved herein was, a corporation duly organized under the laws of the State of Delaware with its principal business office at the City of Bartlesville, Oklahoma, and engaged in the business of producing, purchasing, transporting and selling at wholesale natural gas in the States of Texas, Oklahoma, Kansas, Missouri and Nebraska. Its sales ranged between 100,000,000 and 330,000,000 cu. ft. of natural gas per day depending upon seasonal, economic and industrial conditions (R. 500). It was the owner of an integrated interstate gas transportation system in said states and had three main trunk supply lines, one a 20-inch line leading from the Texas Panhandle gas field, another a 24-inch and 20-inch line leading from the Oklahoma City gas field and the third a 16-inch line leading from the Seminole field of Oklahoma (R. 500). These three supply lines converged in Kansas and the gas contained therein was transported to customers in Kansas and a large portion of same was carried on to customers in the States of Nebraska and Missouri. Said appellee was the successor

to the interests of the Kansas Natural Gas Company and through a course of decisions in this court and in the state courts of Kansas, commencing with *Kansas Natural Gas Company* v. *West*, 221 U. S. 229, 55 L. Ed. 716, including *Missouri ex rel. Barrett* v. *Kansas Natural Gas Company*, 265 U. S. 298, 68 L. Ed. 1028, and ending with *Wichita Gas Company* v. *Public Service Commission*, 133 Kan. 459, it was clearly and conclusively established and decided by said courts that said business was an interstate business of such national character that it was not subject to regulation by the Commissions of Kansas or Missouri, the Kansas Supreme Court in the last-mentioned case, saying:

> "It (the record) shows that this company (Cities Service Gas Company) is an interstate one, not under the jurisdiction of the Utilities Commission, and as is well known by all who have followed the course of gas litigation in Kansas, its charges are entirely outside the power of the state to regulate."

Almost immediately after the decision of the case of *Smith* v. *Bell Telephone Company*, 282 U. S. 133, 75 L. Ed. 255, the Legislature of Kansas enacted Chapter 239 of the Kansas Session Laws of 1931, a copy of which law is annexed in the appendix hereto. Before the enactment of this statute there was no statute in Kansas in any manner relating to transactions of a public utility with an affiliate corporation. Very soon after the promulgation of said law the Public Service Commission of the State of Kansas precipitated an investigation of the contract relations between this appellee and all of its customers in the State of Kansas which were "affiliated" with

it under the provisions, definitions and descriptions in said Chapter 239 and between this appellee and Henry L. Doherty & Company, neither of which was a party to said hearing. No other customer of this appellee, whether corporate or individual, was made a party to this investigation. This appellee was neither a party to said proceeding in any stage thereof nor was there any attempt to make it a party.

The order of said Public Service Commission directing the holding of said investigation recites that,

> "The reasonableness of all contracts, and charges made by holding company to subsidiary companies of Cities Service Gas Company * * * should be inquired into for the purpose of determining the reasonableness of such contracts and the reasonableness of the charges for the services and commodities furnished."

That,

> "The contracts made and charges for services rendered and commodities furnished to said subsidiary distributing companies by the holding company and Henry L. Doherty & Company should be inquired into to determine their reasonableness and to find what amount should be allocated in this respect to the operating expense of the subsidiary companies."

and concludes with the order,

> "That an investigation be set for hearing * * * to inquire into the reasonableness of the contracts made with, and the services rendered to, the subsidiary companies of Cities Service Company by their various holding companies."

The proceeding developed into a valuation of the properties, tangible and intangible, of this appellee lying in all the states mentioned. The Commission sent its employees into all of said states and produced them as its witnesses in this hearing to show what said witnesses concluded to be the reproduction cost, depreciated, of the properties examined and considered. In this valuation the Commission accorded as the value of said properties of appellee only what it deduced from the evidence it had so produced and other evidence produced by the respondents therein as the reproduction cost, depreciated, of those portions of the properties of this appellee which said Commission was convinced should have been used by this appellee in the conduct of its said business and discarded from its valuation many millions of dollars of value of property that this appellee actually had acquired in the ordinary course of its established business and held only for the purpose of such business. The Commission determined the valuation of the properties not as they were but as they concluded they ought to be in our said business.

On August 31, 1932, said Commission as a result of said investigation and as its final order therein issued a bifurcated order, or two simultaneous orders separately signed, the substance of which was that (1) immediately effective this appellee's said customers should cease to set up upon their books any payment made to this appellee for domestic gas in excess of 30¢ per thousand cubic feet and should give no consideration to any sums so paid in excess of said price in fixing in turn their rates to their respective customers; (2) that on the next

succeeding day and continuously thereafter they pass on to their respective consumers a reduction represented by such difference in price between 40¢ per thousand cubic feet and 30¢ per thousand cubic feet. A copy of the pertinent portions of said order is set out on pages 183 and 184 of the record.

Very soon after this appellee learned of said order, it instituted its action (No. 1646-N) in the United States District Court of the proper district against the Public Service Commission, its members, the Attorney General and all of its said customers to enjoin the enforcement of said order by said officers and the obedience thereof by its said customers, alleging in its bill of complaint that the said proceeding and the said orders were illegal and that the necessary effect of same was to, and they did, contravene the rights of this appellee under the Constitution of the United States in that, *inter alia*, they deprived this appellee of its property without due process of law, impaired the obligations of its contracts, denied to it the equal protection of the laws contrary to the Fourteenth Amendment of said Constitution, and they unlawfully burdened, interfered with and regulated commerce among the states contrary to Clause 3 of Section 8 of Article I of said Constitution (R. 184-225). Upon the filing of this petition an interlocutory injunction was issued restraining said officers from the enforcement of said order and said customers from breaching their contracts with this appellee because of said order. For the convenience of the court and the parties, this action was consolidated for trial with actions No. 1637-N to and including 1645-N and they were all tried together. The

court on January 5, 1933, made findings of fact and conclusions of law and on January 28, 1933, entered its decree. The decree permanently enjoined the enforcement of the orders of said Commission, the said Commission having confessed in open court the illegality of the enforcement of the order requiring the said customers of this appellee to pass on the reduction represented by the difference between 40¢ and 30¢ in the purchase price of gas bought from this appellee, and the court having found the issues concerning all other portions of the orders in favor of this appellee. This decree is reported in 2 Fed. Supp. 792. From the decree, enjoining the enforcement of that part of the orders of the Commission concerning the price of gas, appellants have appealed.

SUMMARY OF ARGUMENT.

1. Those injured in personal or property rights will be protected against unlawful acts as well as those nominally subjected thereto.

2. Though neither a party to the hearing, nor nominally included within the order complained of, this appellee was injured by same.

3. The State of Kansas could not confer on its Public Service Commission the power to burden or regulate interstate commerce.

4. The State of Kansas did not confer the power to burden or regulate interstate commerce on the Public Service Commission; appellant.

5. The proceeding had by the Commission was *ab initio*, invalid and illegal as to this appellee.

6. The proceeding and order enjoined by the trial court were an illegal attempt to supplant the business judgment of the managing agents of the necessary customers of this appellee to its detriment, and of the managing agents of this appellee.

7. The fact of affiliation warrants a Commission in scrutinizing but does not justify penalizing.

8. Regardless of the nature of the entire proceeding of appellant Commission and of the isolated usurpations therein the Commission unlawfully eliminated and undervalued the properties of this appellee.

ARGUMENT AND AUTHORITIES.

If the decree of the court was valid, it is immaterial by what process of reasoning the conclusion was reached, and if the order of the Commission annulled by the trial court was illegal and infringed the constitutional rights of this appellee it is immaterial on what ground the said trial court found the said order of said Commission to be illegal. The question is not by what route the court or the Commission travelled but whether the destination reached was the proper one. This is trite law and hence we cite no authorities to support the assertion. Therefore we feel at liberty to approach the question in our own way and attempt to demonstrate the validity of the decree of the court and the invalidity of the orders of the Commission by the use of any valid reasons, whether or not the same were considered by said court or Commission.

1. Those injured in personal or property rights will be protected against unlawful acts as well as those nominally subjected thereto.

In determining the effect of an order affecting property rights of parties this court does not regard seriously the nominal parties subjected to the order or what the letter of the order professes to bring about but regards the consequences of the nature and necessary effects of its operation. This rule often has been laid down by this court with reference to the custom of giving the construction of the meaning of a statute by a highest

court of a given state recognition, but at the same time saying that regardless of such assigned meaning this court must form its own conclusion as to the necessary operation and effect of the statute so construed. So it has been held by this court that where a statute expressly enjoins duties upon certain persons, but in fact operates to impair the rights or injure the business or property of others that such others so injured although not mentioned nor nominally included within the terms and provisions of the law may maintain actions to restrain its enforcement. *Hill Military Academy et al.* v. *Pierce*, 268 U. S. 510, 69 L. Ed. 1070, and cases therein cited.

2. Though neither a party to the hearing nor nominally included within the order complained of this appellee was injured by same.

It is alleged by this appellee in Paragraph 16 of its bill of complaint,

> "That plaintiff's business could not be continued if it were deprived of the business of said distributing company defendants * * *" (R. 213)

and in Paragraph 16 of the answer of appellants this allegation is expressly admitted (R. 272). In the last finding of fact made by the court under Rule No. 70½ the court finds,

> "The distributing companies could not continue their business and pay the Cities Service Gas Company 40¢ per m. c. f. and predicate their rates to the consumers upon 30¢; the Cities Service Gas Company could not continue its business without the patronage of the distributing companies" (R. 319).

It was agreed by appellants that,

> "the rate established by the Commission in its order Exhibits L-H (the orders enjoined by the lower court) if applied to the business of Cities Service Gas Company for the year ending June 30, 1932, would result in a reproduction of earnings of $1,926,145.07" (R. 373).

Therefore it conclusively appears that since this appellee cannot continue its business without the patronage of said customers, that there would be an injury to it by the enforcement of the order involved to the extent of nearly $2,000,000 annually. Since it thus conclusively appears that this appellee could not continue its business without the patronage of said customers and further that said customers could not continue in business and pay this appellee 40¢ per m. c. f. for gas and charge therefor in the rate to its customers as an operating expense 30¢ per m. c. f. it inevitably follows that by this order and in this particular instance the said Commission has stricken down a contract which is an integral part of interstate business and has directly so burdened the established course of the interstate business of this appellee that it has forced upon it annually a revenue loss of nearly $2,000,000 which it would not have sustained but for such interference and regulation by a state commission.

3. The State of Kansas could not confer on said Commission the power to burden or regulate interstate commerce.

It was undisputed and expressly admitted at the trial that the business of Cities Service Gas Company was a business that was not subject to the regulation of appel-

lants. That its established course of business was and for many years past had been continuously commerce among the states could not have been successfully disputed and there was no attempt to dispute the fact, but instead, the appellants took the position that there was no attempt in said hearing or by said order to interfere with or regulate the business of this appellee. We believe that it has been sufficiently demonstrated that the order was a direct, substantial and violent attempt to burden, regulate and impair interstate commerce, practically to the extent of prostration of same. If it should be contended that the holding of a rate hearing is but an indirect and a slight burdening or regulating of interstate commerce the answer would be that no rate hearing was attempted or had. No rate or rate base was attempted to be ascertained for any distributing company customer of this appellee. The Commission instead of holding rate hearings to determine what said respective customers should charge to the public instituted only an assault upon the contracts of this appellee which fixed the price of gas bought by said distributing companies. This was entirely foreign to the functions of a public utility commission. In the case of *Nowata County Gas Company* v. *Henry Oil Company*, 269 Fed. 742, it was well said as to Oklahoma, whose laws concerning public service commission activities are well in line with the general laws prevailing over the country regarding same, and quite similar to those of Kansas, that,

> "Laws, Okl. 1913, C. 93, creating a state corporation commission, to 'have general supervision over all public utilities, with power to fix and establish rates,' etc., confers power only to fix rates to be

> charged by such utilities to their customers, and has no relation to prices to be paid by a public utility for a commodity furnished by it to the public, and the Commission is without jurisdiction over such prices, where the seller is not charged with any duty to the public."

In opinion on pages 745 and 746 this Circuit Court of the 8th Circuit, of which Kansas was then one of the component states, said:

> "Our attention has not been called to any decision by any court which holds that under the police power the state may create an administrative body or commission with authority to fix or establish prices to be paid by a public utility for things purchased and used by it, or, as in this case, for a commodity furnished by it to the public."

This case has never been reversed or disapproved and we can find no other case in any court disputing the doctrine announced.

We shall later endeavor to demonstrate the vital distinction between the act of a Commission assigning to any given element entering into the composite ultimate charge to the public, called a rate, a demonstrated reasonable value in a rate hearing, and the act of such Commission picking out any given element entering into such rate and dictating to the utility its action concerning such segregated element. The former is ordinary procedure; the latter is usurpation.

4. The State of Kansas never conferred nor attempted to confer such power on the appellant, Public Service Commission.

It will be seen that when on December 1, 1930, this court decided the case of *Smith* v. *Illinois Bell Telephone*

Company, 282 U. S. 133, this court said that in a rate hearing where the fairness of the charge of a parent or affiliate company to a subsidiary or affiliate was challenged that it was the duty of a court annulling the order of a Commission, and the duty of a Commission, to ascertain the cost of furnishing, by said affiliate to said public utility involved in such rate hearing, of the service or articles, the fairness of the price of which was so challenged. We are warranted in assuming from the sequence of events and the nature of developments that the Legislature of Kansas, when it enacted, a short time after this decision, Chapter 239 of the Session Laws of 1931, had in mind this decision and sought to carry the force of it into effect by enacting a statute concerning holding companies and affiliated corporations. It had no laws expressly dealing with or including these specific subjects. Since said chapter by ordinary rules of construction must not be considered superfluous it is fair to conclude that Kansas had no law conferring upon its Public Service Commission any power to deal with affiliated corporations in any other manner than with corporations not affiliated, and since the whole of the powers of the Commission was statutory, before the enactment of said chapter the Commission would have no power in that regard except such as would be accorded to it the same as to all other persons or entities of relying upon and enforcing the common-law rules of evidence and presumptions concerning affiliated corporations, which might be incapable, because of potential stock control, of carrying on purely adversary transactions between themselves.

This statute did not attempt to confer upon the Commission any power to scrutinize or control contracts between affiliates except those that should be made "hereafter." The contracts of Cities Service Gas Company were subsisting contracts on March 9, 1931, when said chapter took effect. It further appears that the Commission is given authority over contracts made by affiliates only,

> "in ascertaining the reasonableness of a rate or charge to be made by a public utility."

There was no rate hearing or any investigation concerning the rate or charge, of any of the distributing company customers of this appellee, pending. Finally, we must observe that the statute expressly shows what procedure shall be taken, and what the power of the Commission shall be, as to the contracts between affiliates, even as to those "hereafter" made, and in a rate hearing, when it is said:

> "Such showing shall consist of an itemized statement furnished by the utility setting out in detail the various items, cost for services rendered and material or commodity furnished by the holding or affiliated company."

We believe that the Legislature intended by this chapter to authorize only such proceedings as the Public Service Commission could constitutionally exercise and that they carefully avoided bestowing any power except in a rate hearing and that power only such as would not infringe upon the activities of an interstate instrumentality; that it was never intended that the Commission should make

a valuation of properties lying in other states or make a determination of how the business of an interstate instrumentality should be conducted. We believe that by this statute there was intended to be conferred upon the Commission only the power of ascertaining facts as they were and not the power of recasting management, policy or good faith determinations of the managing agents of a company engaged only in the conduct of interstate commerce—of for that matter of any company not so engaged.

5. The proceeding had by the Commission was, ab initio, invalid and illegal as to this appellee.

(a) It was authorized by no statute and the powers of the Commission are purely statutory. This point we deem to have been sufficiently developed as an incident to discussion of other subject matter above.

(b) The hearing was an attack upon our contracts relating to sales to public utilities and was not an attempt to determine the charges of any public utility to the public.

(c) The necessary operation and effect of the proceeding was to obstruct interstate commerce.

Without a *first sale* of our product our interstate commerce transactions could not possibly be completed. The sale is as much a part of the commerce as is the transportation or any other element of same. This has been the uninterrupted course of judicial decisions by this court from the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Brown* v. *Maryland*, 6 L. Ed. 678, 12 Wheat. 419, to the recent case of *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, and the very late case

of *State Tax Commission of Mississippi* v. *Interstate Natural Gas Company*, 284 U. S. 41, 76 L. Ed. 156.

(d) The proceeding violated the principles laid down in *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, in that it purported to ascertain the return we were making and should make from our properties in all states rather than the return we were receiving from the portions of our properties allocable to the services to the distributing companies involved or to any particular distributing company involved.

The proceeding was void on principle and as to details because the Commission did not undertake to ascertain, and made no findings upon, the cost to us of delivering the gas at the respective city gates or at any city gate. The *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, was reversed largely because of the same error in hearing in that case. The Commission and the court undertook to find the return to Western Electric Company from its whole business by use of all its properties and the court said that this was wrong; that the inquiry should have been as to the cost and profit ensuing from the particular transactions with the Illinois Bell Telephone Company and with it only. So in this instance we have many customers not located in Kansas, many other customers in Kansas not in any way affiliated, and it would be improper to commingle properties used in serving them and earnings received from transactions with them with those involved in serving our particular customers against whom this hearing was precipitated. In *Western Distributig Company* v. *Public Service Commission*, 285 U. S. 119, 76 L. Ed. 655, it was decided by this court that the cost or rea-

sonable charge for gas at one city gate was not even *prima facie* evidence of what the same should be at the gate of another city. We believe that this blunder of the Commission was so egregious, so fundamental and so vital, that this reason alone compels the support of the decree of the court regardless of any other impeachment of the order of said Commission.

(e) The proceeding was invalid because it fixed no rate to the consumer but undertook only to prescribe and effectually fix the rate of return of a business in interstate commerce. In view of the admissions of appellants, adverted to, that the operation of the order would entail a loss of approximately $2,000,000 annually upon us, that we could not continue our business without the patronage of our said customers and the finding of the court that our customers, the distributing company appellees, could not buy gas at 40¢ and sell it at 30¢, and the peculiar form of the proceeding and order, we believe it will become at once apparent to this court that the intention of the Commission, or at least the necessary operation and effect of its order, was that this appellee should absorb said loss and that its said sales in interstate commerce should to that extent be directly burdened by said order. This court in the said case of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, forcibly remarked, when the trial court and the Commission had attempted to pass upon the fairness of a division of the revenues arising from interstate tolls, that that prerogative was lodged in the Interstate Commerce Commission and neither the court nor the Commission had any power to determine that, because it related to an interstate activity. The

thing thus denounced in the Smith case is less obnoxious than the Commission's action in this case, because in this case there was no intermixture of intrastate and interstate activities, and also for the reason that in the case of Illinois Bell Telephone Company the interstate business enjoyed the protection of the Interstate Commerce Commission, insuring it a fair rate of return, while in this case there is no commission or authority to protect this appellee except the authority of the Federal Constitution as applied by the decisions of this court.

6. The proceeding and order were an illegal attempt to supplant the business judgment of the managing agents of our necessary customers to our detriment, and of the managing agents of this appellee.

We have before stated that we should attempt to demonstrate the vital distinction between a rate hearing in which a public service commission attempts to determine and prescribe what shall be a reasonable rate for a service to the public and an attack on a contract governing the cost to the utility of only one of many elements entering into the composite quantity known as a rate. In a rate hearing a commission properly receives evidence concerning the costs of all the elements entering into operating expenses. It receives evidence concerning the fair value of the property of that utility enlisted in the service for which those rates are charged. When it has received this evidence the Commission determines in its own mind the aggregate of the operating expenses and the aggregate values of the items of property involved and determines what a reasonable return upon the value

of said property would be, and, after subtracting operating expenses from the gross return of said utility, it determines whether the net result is higher or lower than reasonable return. In the light of this information it prescribes the ultimate charge to the consumer which is called its rates. In this process it has had nothing to do with the dictating to the utility of what it shall pay to any third persons for wages, supplies, rent or any other item. If, after the fixing of the rate prescribed, the utility sees fit to recast the items of its operating activities, increasing some and diminishing others, reducing salaries, buying other or different kinds of typewriters, utilizing different stationery or in any manner changing its business policies or activities to accomplish the prescribed rate, that is of no concern whatever to the Commission. The Commission has no right to champion the cause of wage earners, of typewriter salesmen, of landlords, and by the same token has no right to assail them, so long as its prescribed rate is accomplished. If any other principle were attempted, it would mean the obliteration of corporate autonomy of all public utility corporations. If it can dictate the activity of the utility as to one purchase by it, it can of every purchase, and by whatever title it may be called every disbursement of a utility is in essence a purchase. This court has uniformly held that no public service commission can deprive a public utility of corporate autonomy and that the power of the owners of such property is the same as that of the owners of every other species of property except in these respects, that the Commission has power to prescribe reasonable rates, efficient service and to

prohibit discrimination. In *Int. Com. Comm.* v. *Chicago G. W. Ry. Co.*, 209 U. S. 108, 52 L. Ed. 705, this court said,

> "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rates for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager."

Again in *Int. Com. Comm.* v. *Ala. Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, this court said,

> "Subject to the *two* leading prohibitions that their charges shall not be unjust or *unreasonable*, and that they shall not unjustly *discriminate* so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and their important interests, upon the same principles which are regarded as sound and adopted in other pursuits."

Again in *Great Western Ry. Co.* v. *Minn.*, 238 U. S. 340, 59 L. Ed. 1337, this court said,

> "A railroad's possessions are subject to its public duty; but beyond this and within charter limits, like *other owners* of private property, it may *control its own affairs.*"

This court in the case of *State ex rel. S. W. Bell Tel. Co.* v. *Comm. of Missouri*, 262 U. S. 276, 67 L. Ed. 981, said,

"Four and one-half per cent is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable rule is well expressed in *Stat. Public Ut. Comm. ex rel. Springfield* v. *Springfield Gas & E. Co.*, (Ill.) 125 N. E. 891, 291 Ill. 209.

"The Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporations; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers."

The proceeding and the order of the Commission are an encroachment upon and invasion of the inherent right of this appellee to conduct its interstate business in accordance with its own best business judgment.

The record discloses that the Commission in its proceedings and orders made no attempt to recognize the inherent right of this appellee to conduct an interstate business according to the best judgment of its board of directors and managing agents as they were pursuing an established business in its ordinary course and as they were conducting it at the time the hearing was commenced. The Commission instead of taking us historically as they found us sought to and did consider us as they thought our business could have been and ought to

have been conducted. They viewed our operations retrospectively and sought to recast our properties and our operations to conform with that judgment that looked backward and viewed, without responsibility for its conduct, the panorama of activities of past years that the managing agents of our company had to create while viewing the situation prospectively and had to meet as unsolved and perplexing problems, one by one, as they arose. By this method of operation this Commission lopped off from our possessions approximately 1,000,000 acres of gas leases and discarded entirely a compressor station, in Oklahoma, joined to our system which the undisputed evidence showed to be valuable as a stand-by protection for the present and as a necessary adjunct to our future operations to safely and successfully carry on our said interstate business (see affidavits of H. R. Straight, General Manager, R. 497, and of Geo. H. Baird, General Superintendent of Operations, R. 499). The said Commission also eliminated a management fee amounting to more than $50,000 annually which the proof supported (Castor's statement R. 371), although said Chapter 239 had no bearing upon a contract for such fee, since we are not a public utility under the purview of that statute, and although we were not subject to the jurisdiction of said Commission. Said Commission also eliminated many other items of operating expenses on the ground that in their business judgment they were unnecessary although all the evidence upon the point expressly dealing with such questions supported the validity of such operating expenses.

On page 498 of the record it is shown by the testimony of our general manager that we have but one single business, that of producing, buying, transporting and selling gas at wholesale in interstate commerce and derived no income except from this business. This evidence is undisputed. If this Commission could deny to us a return upon the many millions of dollars worth of property which it decided we do not need, although the evidence is undisputed that it was held only for this single business, it is a necessary result that we shall be deprived of this property. Without income to pay rentals on leases and to maintain the other properties so rejected we must sell them if we can or lose them if we can't, in obeisance to the business judgment of a political board that confessedly has no regulatory power over us but which indirectly supplants our business judgment with its judgment. If the cases cited under the last preceding heading are good law when a Commission attempts this substitution of business judgment with a regulated public utility then *a fortiori* it must be good law applied to a business in interstate commerce not subject to regulation. We confidently contend that the rule as to information to be acquired by a commission under the *Smith Case*, 282 U. S. 133, and the *Western Distributing Company Case, supra*, could by their most liberal extension be held as authority only to ascertain our business, costs and profits as they really are and could not by the most far-fetched construction contemplate a Commission torturing or remodeling our business, property or earnings into that form or extent which the Commission might fancy they ought to have.

7. The fact of affiliation warrants a commission in scrutinizing but does not justify penalizing.

The Commission in its operations upon which its order was based has made much of the fact of affiliation of our customers with us. That it regarded this element as material is demonstrated by the fact that it left out of its proceeding all of our customers that were not affiliated with us. We believe this element has a bearing only upon the *prima facie* weight of existing contracts. As between persons entirely unrelated, capable to the full extent of adversary negotiations and commitments, there is *prima facie* accorded the presumption of good faith and full value. As to persons so affiliated that, by potential stock control, the activities of each might be dominated by one superimposed entity it is possible that the law is that there is a presumption of incapacity for arms-length dealing between them and a presumption that the contract was not the result of adversary negotiations, but comprised such mutual concessions as to be beneficial to the superimposed controlling corporations. Beyond this *prima facie* aspect of the dealings, and especially in the absence existing in this case, of allegations of fraud, overreaching or imposition, we believe that a contract between related corporations is as valid as between those entirely unrelated. To epitomize the thought we assert that while affiliation justifies a commission or court to scrutinize it does not warrant them to penalize.

The form of affiliation that existed in the case of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133,

that existed in the case of *Houston v. S. W. Bell Tele. Co.*, 259 U. S. 318, 66 L. Ed. 961, and that existed in *State ex rel. S. W. Bell Tele. Co. v. Missouri Public Service Commission*, 262 U. S. 276, gave to American Telephone & Telegraph Company, by virtue of stock control, a much more complete power of domination of the respective utilities subject to regulation than could the form of stock control of Cities Service Company give over this appellee and over its distributing company customers. In this case Empire Gas & Fuel Company of Delaware owns the common stock of this appellee. Cities Service Company owns the common stock of Empire Gas & Fuel Company amounting to the nominal value of $37,500,000, but the public owns its preferred issue of the nominal value of $54,000,000 (R. 210, 271). Should it be assumed that beyond a certain point in the over all price for gas to the public there would be a diminishing return, or, in other words, that the traffic would bear only so large a price before return would decrease because of the lack of patronage, and that this appellee and any respective distributing company did not deal at arm's length, if there is any overreaching or imposition the natural assumption would be that it would be in behalf of the distributing companies to lower the city gate price and thus enable the distributing companies to make a larger profit than if the city gate price were higher, because Cities Service Company would indirectly receive all the profit arising from distributing company activities while the first claim upon the profits of this appellee is by law and in fact in behalf of the holders of the pre-

ferred stock of Empire Gas & Fuel Company. It is thus fair to assume that Cities Service Company would ultimately get but a portion of the profit arising from dividends upon the stock of this appellee. Condensed to its ultimate analysis the conclusion is, that any lack of arms length dealing would result not in raising the city gate price but in the lowering of it so that Cities Service Company might reap the greater and unshared profit.

Since fraud, overreaching and imposition are not alleged there only remains the question as to whether this appellee and the respective distributing company customers have sufficient corporate autonomy and activity under the evidence to prevent the respective corporate entities from being obliterated as mere instrumentalities, sham forms, simulacra. There is no evidence suggesting that such condition exists and the fact of their places of business being hundreds of miles apart and their businesses so different in character, taken with the other evidence in the case, clearly demonstrates that each corporation is moving among its fellow corporations and competitors as a separate, distinct and autonomous corporate entity, sustaining each its own liabilities, performing each its own obligations and never being called upon by anyone affiliate or stranger to assume or answer for the duties, obligations or liabilities of the other. Cities Service Gas Company is a composite of several pioneer gas corporations of Kansas and Oklahoma and aside from stock ownership in it, before alluded to, on the part of Empire Gas & Fuel Company and the further stock ownership of Cities Service Company in the latter there is no operative con-

nection between Cities Service Gas Company and Cities Service Company other than the contract that Henry L. Doherty & Company as fiscal agent of the latter when *called upon* by the former will for 1¾% of gross revenue derived from sales to unaffiliated corporations perform certain services "under the supervision of" the Board of Directors of Cities Service Gas Company. See record page 372 where this stipulation among all parties was made:

> "that there is no species of domination or control over Cities Service Gas Company * * * other than such as *necessarily* arises by ownership of all the voting stock except qualifying shares by Empire Gas & Fuel Company and as may be implied, if any, by the management contract above mentioned."

The extent to which the evidence must go to warrant courts in obliterating or ignoring corporate entity is well set out in the case of *Berkey* v. *Third Avenue Railway Co.*, 155 N. E. (N. Y.) 58. This case has been so often cited that it may well be considered to have become a leading case upon the subject. A brief excerpt from the opinion in this case is very indicative of the caution of the courts on this subject. The court said:

> "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as 'an alias' or 'a dummy.' All this is well enough if the picturesqueness of the epitaphs does not lead us to forget that the essential term to be defined is the act of operation. Domination may be so complete, interference so obtrusive,

that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice."

After the foregoing generalization as to nomenclatures, metaphors and oratorical conclusions, the court sets forth concrete indicia of separate corporate life and autonomy and also in detail the things claimed to deprive it of such, which details are so pertinent to the situation here that we cannot refrain from quoting at length. The court said:

"The subsidiary deposits in its own bank account the fares collected on its route. It pays out of that account and no other the wages of the motormen and conductors engaged in the operation of its cars. It was not organized by the defendant as a decoy or blind. It was not organized, so far as the record shows, by the defendant at all. There is no evidence that at the time of its formation the defendant had any interest in it as a shareholder or otherwise. Its franchise goes back to the year 1884, and through all the intervening years it has preserved its corporate organization with property adequate to the maintenance of life. Its balance sheet for the year ending July, 1917, shows assets of $12,456,847.86. The values there stated are much in excess of the debts and liabilities, including in the reckoning of liabilities the outstanding capital stock. In no possible view, even if they are to be scaled down to some extent, are they unsubstantial or nominal. True, the subsidiary lost money that year, but so also did its parent. The fact remains that it was functioning as a corporation continuously and actively. It was so functioning at the trial in 1924. There is no evidence or suggestion that it has ceased to function since.

"The question is whether other circumstances yet to be noted neutralize these indicia of separate life and operation. The defendant, as we have seen, was the owner, in 1916, of substantially all the stock of the subsidiary corporation. Its president in reporting to the stockholders the financial situation at the end of the fiscal year informed them that to make the picture accurate, the statement must exhibit the consolidated income, and this was obviously true. Other ties must be shown in addition to the one resulting from ownership of shares. The members of the two boards of directors were nearly, though not quite, the same. Each road had the same executive officers, *i. e.*, the same president, treasurer, general manager, paymaster and counsel. The parent has made loans to the subsidiary from time to time, sometimes for construction, sometimes for operating expenses. The loan for construction expenses ($6,415,152.92) is represented by a demand note. There is nothing to show whether the money was borrowed for the original construction in 1884, or for later changes of construction when the road was electrified. The parent is also the holder of the second mortgage bonds, $1,487,000, the first mortgage bonds, however ($1,200,000), being issued to the public. The operating loans are temporary advances for electric power, for materials or supplies, and for the salaries of executive officers. As a matter of convenience, these are made in the first instance out of the treasury of the parent company. They are then charged to the account of the subsidiary, and repaid generally the following month and not later than the following year. Repayment is inconsistent with an understanding that the parent, in making the advances, was operating on its own account the cars of a connecting line. The charges are more than book entries, mere devices of an accountant. Drafts are drawn upon the subsidiary and paid with its own money. The unpaid advances for operation in July, 1917, were only $253,029.37, and this at the end of a poor year. We

are not to confuse the salaries of the executive officers with the wages of motormen and conductors. The latter, as already pointed out, were paid in the first instance, as well as ultimately, by the subsidiary itself. So were many other expenses for maintenance and repair. So were the many judgments for personal injuries recovered in the past.

"One other circumstance or group of circumstances is the subject of much emphasis in the arguments of counsel. The defendant was the dominant stockholder, not only in this subsidiary, but also in many others. The routes, when connected, cover an area from the lower part of Manhattan at the south to Yonkers and other points in Westchester at the north. All the cars, wherever used, are marked 'Third Avenue System.' On the other hand, the transfer slips bear the name in each instance of the company that issues them. The cars, when new ones become necessary, are bought by the defendant, and then leased to the subsidiaries, including, of course, the Forty-second Street Company for a daily rental which is paid. The cars leased to one road do not continue along the routes of others. The motormen and conductors do not travel beyond their respective lines. With the approval of the Public Service Commission, transfer slips are issued between one route and another, but transfers could have been required by the Commission if not voluntarily allowed. Public Service Com. Law, par. 49, subds. 3 and 6; Consol. Laws, C. 48."

On the foregoing facts it was held that the evidence was not sufficient to justify a finding of agency or the right to disregard corporate entity. This prominent case is a typical one dealing with the question of ignoring corporate entity because of affiliation by stock control and we have been unable to find any decision either of this court or any other court of precedent denying the

doctrine therein promulgated or differing with it upon essential principles involved.

In every one of the American Telephone & Telegraph cases last above mentioned this court held that the corporate entity could not be ignored and that while it justified the court to scrutinize it did not induce it to penalize. The same conclusion was reached by this court in the case of *United Fuel Gas Co.* v. *Comm. of Kentucky*, 278 U. S. 300, 73 L. Ed. 390.

Upon scrutiny of the contract and the situation of the respective parties to the gas purchase contracts we find that the undisputed evidence shows that the contract price is not higher than that of comparable unrelated corporations in the vicinity and in similar regions; that the price is not higher than that charged by this appellee to unrelated customers; that those unrelated customers are within reach of competing pipe line companies; that the 40¢ price was originally fixed by the predecessors of the Commission enjoined in this case (R. 506); there is no evidence that any city or community is complaining of this price; in short the price is the usual, current and generally accepted price for gas involving comparable transportation and dependability (see Montgomery's affidavit and schedules attached, R. 504 to 509). We contend that these elements together with the other facts in the case conclusively show that the contract price was a fair price, and no other element thereof being criticized, that, therefore, the contract itself was a fair contract. If it is a fair contract it is entitled to the same respect and weight as if it were made by unrelated corporations. This court has substantially in effect so decreed in the

American Telephone & Telegraph cases above mentioned and we know of no subsequent departure therefrom by this court.

If the contract was a fair contract it would not matter whether the price itself was somewhat above the lower limits of the price range beyond which confiscation would occur. A price may be substantially above such line of demarkation if it stays within the zone of a reasonable price. We believe that such reasonable price would be the amount that is usually and customarily arrived at by persons under similar circumstances as a result of adversary negotiations and arms' length dealing, in the absence of an overriding necessity created by a monopoly. There can be no thought of monopoly in this case under the evidence since competing pipe lines were within striking distance of our unrelated customers (see Montgomery's affidavit, R. 504 to 509). A case decided by this court clearly setting out the difference between a reasonable price and the lowest possible price before confiscation is cited in brief of appellants as authority and is *Banton* v. *Beltline Ry. Corp.*, 268 U. S. 413, 69 L. Ed. 1020. An illuminating excerpt is as follows:

> "The mere fact that a rate is not confiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive and extortionate."

Citing *Triar* v. *Chicago Ry. Co.*, 30 Intrs. Com. Rep. 352; *Holmes & H. Co.* v. *Great Northern R. Co.*, 37 Intrs. Com.

Rep. 657; *Dimmit-Caudle-Smith Live Stock Commission Co. v. R. R. Co.*, 47 Intrs. Com. Rep. 287; *D[illegible] M. R. Co. v. Mich. R. Comm.*, 203 Fed. 864.

We confidently contend that after the *prima facie* barrier of affiliation warranting scrutiny to prevent overreaching has been hurdled by showing that the contract was the kind that was customarily made in adversary dealings and voluntarily made by those dealing at arm's length that then the distinction in law between affiliation and unaffiliation in that transaction has disappeared and that the end of the quest has been reached when it has been discovered that the contract is a fair contract. If by unusual economy, efficiency, or foresight a party to that contract has earned a per cent or fraction of a per cent more than some state commission should determine was a proper interest rate or a proper return upon an alleged "rate base," there would be no warrant in striking down the contract thus vindicated.

8. Regardless of the nature of the entire proceeding and of the isolated usurpations therein, the Commission unlawfully eliminated and undervalued our properties.

Since we were not a party to the proceeding before the Commission and since the record evidence therein produced by others was, for the mutual convenience of the court and the parties, introduced before the trial court, we necessarily have been unable to become as familiar with those proceedings and the details of the evidence so introduced as our said customers, the distributing company appellees herein. For this reason, and this alone, we adopt

the arguments and assertions by counsel for said appellees contained in their brief filed herein, relating to the merits of the appraisal actually made; that is, dealing with the amounts of the values of the respective items of our properties, whether tangible or intangible, and by reference we make said allegations and arguments a part of this brief. However, we do not confine ourselves solely in dealing with the question of the valuation of our properties to the said things so adopted and wish to call the attention of this court to the following matters:

(a) On the question of the amount and value of our gas leases we wish to call the attention of the court to the fact that they are owned by an unregulated and purely interstate instrumentality. If the Commission had been dealing, in a rate case, with a regulated company within its jurisdiction, its duty would probably have been to find what of the properties investigated were "used and useful"; but when it assumes to pass upon the value of the property of an unregulated company (assuming but not conceding that it has extraterritorial jurisdiction) it must limit its activities to the taking of such company historically as it finds it going along in its usual business, good faith assumed, of course, and value all the properties of said entity that have been bought for and are held for the business of that entity. We have shown by the testimony of our general manager (R. 498 and 499) that we engage in but one business, said witness testifying as follows:

> "That plaintiff has but one single business, which is the business of supplying gas to its patrons

through its network of pipe lines lying in the States of Texas, Oklahoma, Kansas, Nebraska and Missouri, which gas it wholesales to its customers; that it currently receives no income except that produced from said business; that unless it uses a portion of the income from said business to maintain and preserve its leasehold estates, acreages and gas reserves, same will be lost to it and plaintiff will not be able to continue in the future to have a dependable gas supply that it customarily possesses, nor give that dependable service which it has uniformly given to its patrons."

Of course, this particular piece of evidence was not before the Commission but in principle the facts were made known to the Commission. Another piece of evidence introduced before the court which would require consideration of many of the leases discarded by the Commission, even giving force to their own reasons therefor, is to be found in the testimony of our general superintendent of operations (R. 501) as follows:

"To obtain a satisfactory degree of dependability it has been necessary for plaintiff for many years past, and is now necessary for it, to have large natural gas reserves located in as diverse directions from the center of its system as is practical and with the view of preserving a dependable supply at the lowest cost, it acquired large supplies or reserves in the Seminole Field, the Oklahoma City Field, the Texas Panhandle Field, the Oklahoma Panhandle Field, the Hugoton Field, other Western Kansas fields, and Northeastern Oklahoma."

This fact was testified to by our manager and was undisputed (R. 507):

"That it is very desirable to have gas reserves located in as diverse a direction from the geographi-

cal center of plaintiff's system and markets as possible, and plaintiff's gas reserves have been acquired largely with relation to its markets and its existing or projected pipe lines and the respective capacities of such pipe lines."

It is apparent that beforehand we would be unable to divine exactly where and to what extent gas would be found underneath the ground. The effect of not obtaining prospective production acreage is shown by our said general superintendent of operations (R. 503) as follows:

> "That if plaintiff should wait for the discovery and development of new fields by others it would probably frequently experience shortages of supplies necessary for its markets while so waiting for others to take the lead, and also if plaintiff should abjure all initiative on its part and wait for others to develop gas fields it would be compelled to pay exorbitant prices for its gas reserves and supplies and at times be confronted with the alternative of either paying prohibitive prices or being short of gas."

The propriety of dealing in a different way with an unregulated interstate company from that which would be proper with a regulated utility becomes apparent if we consider underlying reasons. A commission may well restrict a regulated utility to the possession of properties that are only presently or in the immediate future "used and useful" on the ground that its customers should not pay for benefits to accrue very far in the future. This can be done safely because the regulated utility theoretically is continuously assured of a reasonable return upon the properties it may have at any given time by the power and duty of the Commission to so regulate its rates as to currently produce that reasonable

return. We as an unregulated interstate entity can have and claim no such protection and, therefore, we must prudently prepare our affairs, so far as careful foresight will enable, so as to protect ourselves against vanishing gas fields, economic vicissitudes and other future menacing problems. If we wait while others lead and have to pay exorbitant prices there is no one to mend our fortunes. We must fight our own economic battles and of necessity must use the judgment of our managing agents to meet our problems.

The court found that the cost of our gas leases was something over $5,000,000 but found that the fair value of them was about $12,000,000 (R. 313). There is a margin of approximately $7,000,000 there which under the authority of the case of *Los Angeles Gas & Elec. Corp.*, 77 L. Ed. ...., 820 of Advance Sheet No. 13 of Reports covering the 1932 term of this court, should be taken by this court for our benefit if this court should consider that the trial court considered any other item of value more advantageously to us than the law would warrant. In *United Fuel Gas Co.* v. *Comm. of Ken.*, 278 U. S. 300, 73 L. Ed. 390, this court said the Commission and trial court were authorized to take the cost only because no better standard or yardstick of value was presented. We confidently contend that the Commission materially erred in appraising our leases at approximately $3,000,000 because it saw fit to exclude practically a million acres of leases which it claimed were not "used and useful" and that we have a margin to spare as to those values above the allowance by the trial court of approximately $7,000,000 worthy of the consideration of this court.

(b) The Commission excluded from its valuation a large compressor station attached to the southeastern portion of our pipe line system, in Oklahoma, because it was not presently "used and useful" in that it was not being operated. Our evidence (which was produced before the trial court, but not before the Commission because we were not a party) showed,

> "That on account of extensions into Missouri and the said consequent enlargements plaintiff has been, and is holding the Hogshooter Compressor Station in constant readiness to serve its said pipe line system and especially its said extensions into Missouri. That by use of said compressor station it would add a transmission capacity of approximately 20,000,000 cu. ft. of natural gas daily and by such use it can accomplish such result much cheaper than in any other manner. That while said order of the said Texas Railroad Commission is operative it will be necessary for plaintiff in cold weather to use said Hogshooter Compressor Station to increase the transmission capacity of its lines from whatsoever source it gets its added supplies, and whether said Texas order remains in force or not upon resumption of normal financial conditions or the natural growth of more markets along the said newly constructed extensions, the economical operation of plaintiff's system will require the operation of the Hogshooter Compressor Station" (R. 504).

We believe it is not possible even under the theory of "used and useful" limitations to discard Hogshooter Compressor Station under this evidence, which was undisputed, and that while under the *Los Angeles Gas & Elec. Decision*, 77 L. Ed. . . . , it might be proper to reduce its value below what would obtain if it were used every day, as the court evidently did, yet there can be no possible dis-

pute of its value as a "stand by" resource and we contend the Commission erred in excluding it and that the trial court was right in including it at its demonstrated fair value.

(c) The Commission excluded the payment of 1 3/4% of gross sales to unaffiliated corporations paid by us to Henry L. Doherty & Company as fiscal agents of Cities Service Company for services. The court in reaching its decree failed to allow anything for this item, saying that, while a portion of the amount involved was evidently proved yet the proof was not clear as to the precise amount to be allowed (R. 299 and 300). If we are right in our contention that the Commission must take our activities as they find them and do not have the power to restrict, in the absence of the charge of fraud or lack of good faith, then we were entitled to have the payments which we actually made under this contract credited to us as operating expense. This amount for the year 1932 was more than $50,000 and for preceding years considered by the Commission was considerably above that amount. Since the net return was approximately 1 15 of the value of assets the rejecting of this item of operating expense would be equivalent to deducting about $700,000 from the base on which they figured a return. We believe that we are entitled to the consideration of this elimination when the court under the doctrine of the *Los Angeles Gas & Elec. Case*, 77 L. Ed. , seeks to determine whether any material error has been committed in the decree of the court enjoining the order of the Commission.

(d) The Commission disallowed as operating expenses the annual payments we were making on non-producing leases in order to prevent their forfeiture. This reduction of operating expenses, automatically increasing alleged rate of earnings, amounted to more than $300,000 for the year of 1932 (R. 314). For the same reasons herein advanced supporting our right to own all the property which we actually in good faith had and held for this single business we were entitled to this allowance and the order of the Commission denying it was invalid. Since such disallowance would be equivalent to striking from the alleged rate base approximately $5,000,000 the item would go far in and of itself to show the confiscatory character of the order of the Commission.

(e) In denying to us any allowance for dry hole expense other than a parsimonious allowance for one dry hole a year the Commission vouchsafed to us infinitely more wisdom in the ascertainment of where gas would be found thousands of feet under the ground than it accorded to us in the general management of our affairs. During the test year more than $170,000 was expended by us on dry holes. A denial of this sum for operating expenses annually would be equivalent to a reduction of the alleged rate base by more than $2,000,000 and it will easily be seen that, where the rate fixed by the Commission is confessedly close to the line of confiscation, or as we claim already below it, this item itself would likely put it well below that line.

We leave the other errors of the Commission involving more complicated details to the brief of other appellees entirely because of our lack of opportunity as aforesaid of possessing the same degree of familiarity with those things as those have who were involved in the proceedings before the Commission.

We respectfully submit that in view of the record in this case and the law applicable thereto that this court should affirm the judgment and decree of the court below.

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APPENDIX.

Chapter 239—Kansas Laws 1931.

PUBLIC SERVICE COMMISSION JURISDICTION IN RELATION TO HOLDING COMPANIES.

Senate Bill No. 304.

An Act relating to the public service commission, in relation to holding companies and of transactions between affiliated interests and public utility companies.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

Section 1. (1) The public service commission shall have jurisdiction over holders of the voting capital stock of all public utility companies under the jurisdiction of the commission to such extent as may be necessary to enable the commission to require the disclosure of the identity in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interest, within the meaning of this subdivision.

(2) Such commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with utility corporations and other utility companies under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be

applicable to such transactions; and to the extent of authority to require such reports to be submitted by such affiliated interests, as the commission may prescribe. For the purpose of this section only, "affiliated interests" include the following:

(a) Every corporation and person owning or holding directly or indirectly ten per centum or more of the voting capital stock of such utility corporation.

(b) Every corporation and person in any chain of successive ownership of ten per centum or more of voting capital stock.

(c) Every corporation ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such utility corporation or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock.

(d) Every person who is an officer or director of such utility corporation or of any corporation in any chain of successive ownership of ten per centum or more of voting capital stock.

(e) Every corporation which has one or more officers or one or more directors in common with such utility corporation.

(f) Every corporation which the commission may determine as a matter of facts, after investigation and hearing, is actually exercising any substantial influence over the policies and actions of such utility corporation even though such influence is not based upon stockholding,

stockholders, directors or officers to the extent specified in this section.

(g) Every person or corporation who or which the commission may determine as a matter of fact, after investigation and hearing, is actually exercising such substantial influence over the policies and actions of such utility corporation in conjunction with one or more other corporations and/or persons with which or whom they are related by ownership and/or blood relationship or by action in concert that together they are affiliated with such utility corporation within the meaning of this section even though no one of them alone is so affiliated: Provided, however, That no such person or corporation shall be considered as affiliated within the meaning of this section, if such person or corporation is otherwise subject to the jurisdiction of the commission or such person or corporation shall not have had transactions or dealings other than the holding of stock and the receipt of dividends thereon with such utility corporation during the two-year period next preceding: Provided further, No foreign holding company shall acquire the stock or control of a local operating unit or public utility in its own name or through a trustee without first entering into an agreement to keep the public service commission fully informed as to the transactions between the subsidiary or local operating unit and the holding company, and to submit to the jurisdiction of the commission in so far as such transactions affect the rate or charge to be made by the subsidiary or local operating unit.

Sec. 2. No management, construction, engineering or similar contract, hereafter made, with any affiliated interest, as hereinbefore defined, shall be effective, unless it shall first have been filed with the commission. If it be found that any such contract is not in the public interest, the commission, after investigation and a hearing, is hereby authorized to disapprove such contract.

Sec. 3. In ascertaining the reasonableness of a rate or charge to be made by a public utility, no charge for services rendered by a holding or affiliated company, or charge for material or commodity furnished or purchased from a holding or affiliated company, shall be given consideration in determining a reasonable rate or charge unless there be a showing made by the utility affected by the rate or charge as to the actual cost to the holding or affiliated company furnishing such service and material or commodity. Such showing shall consist of an itemized statement furnished by the utility setting out in detail the various items, cost for services rendered and material or commodity furnished by the holding or affiliated company.

Sec. 4. This act shall take effect and be in force from and after its publication in the official state paper.

Approved March 6, 1931.

Published in official state paper March 9, 1931.